

**BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA**

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APPLICATION FOR BENEFICIAL WATER) USE PERMIT NO. 76LJ 30159396 BY 2886) REST HAVEN DRIVE LLC)	PRELIMINARY DETERMINATION TO GRANT PERMIT
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2886 Rest Haven Drive LLC (Applicant) submitted Application for Beneficial Water Use Permit No. 76LJ 30159396 to the Kalispell Water Resources Office of the Department of Natural Resources and Conservation (Department or DNRC) on January 24, 2023. DNRC published receipt of the application on the Department website. DNRC determined the application to be correct and complete on March 23, 2023. The DNRC completed an Environmental Assessment for this application on April 28, 2023.

INFORMATION

The Department considered the following information submitted by the Applicant, which is contained in the administrative record.

Application as filed:

- Application for Beneficial Water Use Permit, Form 600-SW
- Appendices:
 - Appendix A. Certificate of County Surveyor
 - Appendix B. Pump Specifications and Pump Curve
 - Appendix C. Hydraulic Calculations
 - Appendix D. Pressure Tank Specifications
 - Appendix E. Fixture Count Demands
 - Appendix F. Irrigation System Specifications
- Figures
 - Site Vicinity Map
 - Site Map

Information within the Department's Possession/Knowledge

- Mean monthly stream flow data for the Whitefish River from the United States Geological Survey (USGS) Gaging Station #12366000 near Kalispell, MT (period of record October 1929 – October 2022)
- Existing surface water rights on the Whitefish River system from the Whitefish Lake inlet to its confluence with the Stillwater River

The Department has fully reviewed and considered the evidence and argument submitted in this Application and preliminarily determines the following pursuant to the Montana Water Use Act (Title 85, chapter 2, part 3, MCA).

PROPOSED APPROPRIATION

FINDINGS OF FACT

1. The Applicant proposes to divert water from the Whitefish River (Whitefish Lake), hereafter referred to as Whitefish Lake, using a pump. Applicant requests to divert a 25 GPM flow rate up to a maximum annual volume of 1.13 AF for year-round domestic use (1.0 AF) and for irrigation of 0.05 acres of lawn and garden (0.13 AF). Domestic use will occur from January 1 – December 31 and lawn and garden irrigation will occur from April 15 – October 15 annually. The point of diversion (POD) and place of use (for both purposes) are located in the NENENW of Section 10, Township 31N, Range 22W, Flathead County, Montana (Figure 1). The place of use can be further described as Lot 50 of the Rest Haven Subdivision. Both the place of use and point of diversion are within the Upper Flathead River Basin (76LJ), in an area not subject to water right basin closures or controlled groundwater area restrictions.

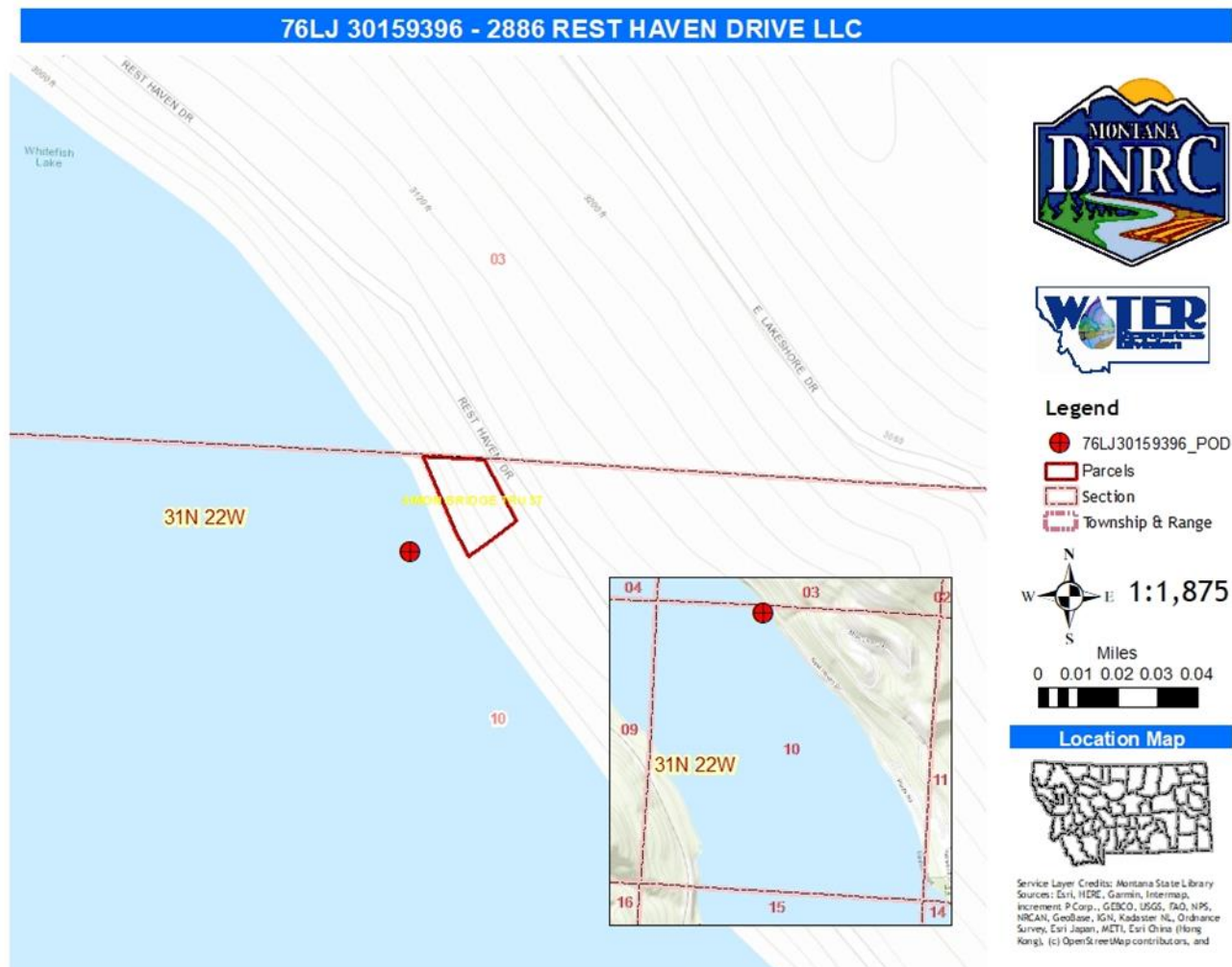


Figure 1: Map of the proposed place of use and point of diversion.

§ 85-2-311, MCA, BENEFICIAL WATER USE PERMIT CRITERIA

GENERAL CONCLUSIONS OF LAW

2. The Montana Constitution expressly recognizes in relevant part that:
 - (1) All existing rights to the use of any waters for any useful or beneficial purpose are hereby recognized and confirmed.
 - (2) The use of all water that is now or may hereafter be appropriated for sale, rent, distribution, or other beneficial use . . . shall be held to be a public use.

(3) All surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law.

Mont. Const. Art. IX, §3. While the Montana Constitution recognizes the need to protect senior appropriators, it also recognizes a policy to promote the development and use of the waters of the state by the public. This policy is further expressly recognized in the water policy adopted by the Legislature codified at § 85-2-102, MCA, which states in relevant part:

(1) Pursuant to Article IX of the Montana constitution, the legislature declares that any use of water is a public use and that the waters within the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided in this chapter. . .

(3) It is the policy of this state and a purpose of this chapter to encourage the wise use of the state's water resources by making them available for appropriation consistent with this chapter and to provide for the wise utilization, development, and conservation of the waters of the state for the maximum benefit of its people with the least possible degradation of the natural aquatic ecosystems. In pursuit of this policy, the state encourages the development of facilities that store and conserve waters for beneficial use, for the maximization of the use of those waters in Montana . . .

3. Pursuant to § 85-2-302(1), MCA, except as provided in §§ 85-2-306 and 85-2-369, MCA, a person may not appropriate water or commence construction of diversion, impoundment, withdrawal, or related distribution works except by applying for and receiving a permit from the Department. See § 85-2-102(1), MCA. An applicant in a beneficial water use permit proceeding must affirmatively prove all of the applicable criteria in § 85-2-311, MCA. Sections § 85-2-311(1) and -311(2) state in relevant part:

... the department shall issue a permit if the applicant proves by a preponderance of evidence that the following criteria are met:

(a) (i) there is water physically available at the proposed point of diversion in the amount that the applicant seeks to appropriate; and

(ii) water can reasonably be considered legally available during the period in which the applicant seeks to appropriate, in the amount requested, based on the records of the department and other evidence provided to the department. Legal availability is determined using an analysis involving the following factors:

(A) identification of physical water availability;

(B) identification of existing legal demands on the source of supply throughout the area of potential impact by the proposed use; and

(C) analysis of the evidence on physical water availability and the existing legal demands, including but not limited to a comparison of the physical water supply at the proposed point of diversion with the existing legal demands on the supply of water.

(b) the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected. In this subsection (1)(b), adverse effect must be determined based on a consideration of an applicant's plan for the exercise of the permit that demonstrates that the applicant's use of the water will be controlled so the water right of a prior appropriator will be satisfied;

(c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;

(d) the proposed use of water is a beneficial use;

(e) the applicant has a possessory interest or the written consent of the person with the possessory interest in the property where the water is to be put to beneficial use, or if the proposed use has a point of diversion, conveyance, or place of use on national forest system lands, the applicant has any written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water under the permit;

(f) the water quality of a prior appropriator will not be adversely affected;

(g) the proposed use will be substantially in accordance with the classification of water set for the source of supply pursuant to 75-5-301(1); and

(h) the ability of a discharge permit holder to satisfy effluent limitations of a permit issued in accordance with Title 75, chapter 5, part 4, will not be adversely affected.

(2) The applicant is required to prove that the criteria in subsections (1)(f) through (1)(h) have been met only if a valid objection is filed. A valid objection must contain substantial credible information establishing to the satisfaction of the department that the criteria in subsection (1)(f), (1)(g), or (1)(h), as applicable, may not be met. For the criteria set forth in subsection (1)(g), only the department of environmental quality or a local water quality district established under Title 7, chapter 13, part 45, may file a valid objection.

To meet the preponderance of evidence standard, “the applicant, in addition to other evidence demonstrating that the criteria of subsection (1) have been met, shall submit hydrologic or other evidence, including but not limited to water supply data, field reports, and other information developed by the applicant, the department, the U.S. geological survey, or the U.S. natural resources conservation service and other specific field studies.” § 85-2-311(5), MCA (emphasis added). The determination of whether an application has satisfied the § 85-2-311, MCA criteria is committed to the discretion of the Department. Bostwick Properties, Inc. v. Montana Dept. of Natural Resources and Conservation, 2009 MT 181, ¶ 21. The Department is required grant a permit only if the § 85-2-311, MCA, criteria are proven by the applicant by a preponderance of the evidence. Id. A preponderance of evidence is “more probably than not.” Hohenlohe v. DNRC, 2010 MT 203, ¶¶33, 35.

4. Pursuant to § 85-2-312, MCA, the Department may condition permits as it deems necessary to meet the statutory criteria:

(1) (a) The department may issue a permit for less than the amount of water requested but may not issue a permit for more water than is requested or than can be beneficially used without waste for the purpose stated in the application. The department may require modification of plans and specifications for the appropriation or related diversion or construction. The department may issue a permit subject to terms, conditions, restrictions, and limitations it considers necessary to satisfy the criteria listed in 85-2-311 and subject to subsection (1)(b), and it may issue temporary or seasonal permits. A permit must be issued subject to existing rights and any final determination of those rights made under this chapter.

E.g., Montana Power Co. v. Carey (1984), 211 Mont. 91, 96, 685 P.2d 336, 339 (requirement to grant applications as applied for, would result in, “uncontrolled development of a valuable natural resource” which “contradicts the spirit and purpose underlying the Water Use Act.”); see also, *In the Matter of Application for Beneficial Water Use Permit No. 65779-76M by Barbara L. Sowers* (DNRC Final Order 1988)(conditions in stipulations may be included if it further compliance with statutory criteria); *In the Matter of Application for Beneficial Water Use Permit No. 42M-80600 and Application for Change of Appropriation Water Right No. 42M-036242 by Donald H. Wyrick* (DNRC Final Order 1994); Admin. R. Mont. (ARM) 36.12.207.

5. The Montana Supreme Court further recognized in Matter of Beneficial Water Use Permit Numbers 66459-76L, Ciotti: 64988-G76L, Starnier (1996), 278 Mont. 50, 60-61, 923 P.2d 1073, 1079, 1080, *superseded by legislation on another issue*:

Nothing in that section [85-2-313], however, relieves an applicant of his burden to meet the statutory requirements of § 85-2-311, MCA, before DNRC may issue that provisional permit. Instead of resolving doubts in favor of appropriation, the Montana Water Use Act requires an applicant to make explicit statutory showings that there are unappropriated waters in the source of supply, that the water rights of a prior appropriator will not be adversely affected, and that the proposed use will not unreasonably interfere with a planned use for which water has been reserved.

See also, Wesmont Developers v. DNRC, CDV-2009-823, First Judicial District Court, *Memorandum and Order* (2011). The Supreme Court likewise explained that:

.... unambiguous language of the legislature promotes the understanding that the Water Use Act was designed to protect senior water rights holders from encroachment by junior appropriators adversely affecting those senior rights.

Montana Power Co., 211 Mont. at 97-98, 685 P.2d at 340; see also Mont. Const. art. IX §3(1).

6. An appropriation, diversion, impoundment, use, restraint, or attempted appropriation, diversion, impoundment, use, or restraint contrary to the provisions of § 85-2-311, MCA is invalid. An officer, agent, agency, or employee of the state may not knowingly permit, aid, or assist in any manner an unauthorized appropriation, diversion, impoundment, use, or other restraint. A person or corporation may not, directly or indirectly, personally or through an agent, officer, or employee, attempt to appropriate, divert, impound, use, or otherwise restrain or control waters within the boundaries of this state except in accordance with this § 85-2-311, MCA. § 85-2-311(6), MCA.
7. The Department may take notice of judicially cognizable facts and generally recognized technical or scientific facts within the Department's specialized knowledge, as specifically identified in this document. ARM 36.12.221(4).

Physical Availability

FINDINGS OF FACT

8. The Applicant proposes to divert a volume of up to 1.13 AF annually at a maximum flow rate of 25 GPM from Whitefish Lake for the purposes of domestic use and lawn and garden irrigation. Physical availability was determined by considering data from USGS Gage #12366000 on the Whitefish River near Kalispell, MT (Sec. 34, T30N R21W). The proposed POD is approximately 16 miles upstream of the gaging station. The Department finds this to be an appropriate point of measurement as it is the nearest gage to the proposed POD. The date range used when considering physical availability of the source includes the entire period of record for this gage (October 1929 – October 2022). Physical availability of Whitefish Lake at the POD is quantified monthly. Department practice for physical availability analyses in which the gage is downstream of the proposed POD is to add the monthly flow rates of existing water rights between the gage and the POD to the median of the mean monthly flows at the gage.
9. To quantify physically available monthly flows and volumes at the POD during the proposed period of diversion, the Department calculated median of the mean monthly flow rates in cubic feet per second (CFS) for the Whitefish River using USGS Gage #12366000 records for each month of the proposed period of diversion (Table 1, column B) and converted the monthly flow rates to monthly volumes in acre-feet (AF) (Table 1, column C).
10. The Department calculated the monthly flow rate and volume appropriated by existing users upstream of the gage on the source (Table 1, column D) by:

- i. Generating a list of existing water rights from the Whitefish Lake inlet to USGS Gage #12366000 (list is included in the application file and available upon request);
- ii. Designating irrigation and lawn and garden uses as occurring from April 1 to October 31;
- iii. Designating all other water uses as year-round uses;
- iv. Assigning a single combined flow rate of 0.08 CFS to all livestock direct from source rights without a designated flow rate as per departmental adjudication standard; and,
- v. Assuming that the flow rate of each existing right is continuously diverted throughout each month of the period of diversion. This method of calculation leads to an overestimation of existing uses from the source; however, the Department finds this an appropriate measure of assessing existing rights as it protects existing water users.

11. Since the gage used is downstream of the POD, the Department added the flow rates of existing rights between USGS Gage #12366000 and the Whitefish Lake inlet (Table 1, column D) to the median of the mean monthly gage values (Table 1, column B) to determine physical availability at the POD (Table 1, column E). Physically available monthly flows were then converted to monthly volumes (Table 1, column F) using the following equation found on DNRC Form 615: median of the mean monthly flow (CFS) × 1.98 (AF/day/1 CFS) × days per month = AF/month.

Table 1: Physical Availability at the Point of Diversion on Whitefish Lake					
A	B	C	D	E	F
Month	Median of the Mean Monthly Flow at Gage 12366000 (CFS)	Median of the Mean Monthly Volume at Gage 12366000 (AF)	Existing Rights from Whitefish Lake Inlet to Gage 12366000 (CFS)	Physically Available Water at POD (CFS)	Physically Available Water at POD (AF)
January	60.50	3,713.49	33.17	93.67	5,749.46

February	57.55	3,190.57	33.17	90.72	5,029.52
March	86.30	5,297.09	33.17	119.47	7,333.07
April	210.20	12,485.88	84.57	294.77	17,509.54
May	496.00	30,444.48	84.57	580.57	35,635.60
June	583.30	34,648.02	84.57	667.87	39,671.68
July	264.70	16,247.29	84.57	349.27	21,438.41
August	104.20	6,395.80	84.57	188.77	11,586.92
September	81.25	4,826.25	84.57	165.82	9,849.91
October	66.90	4,106.32	84.57	151.47	9,297.44
November	68.50	4,068.90	33.17	101.67	6,039.20
December	61.20	3,756.46	33.17	94.37	5,792.43

12. The Department finds the requested flow rate of 25 GPM (0.06 CFS) up to an annual volume of 1.13 AF is physically available in Whitefish Lake during the proposed period of diversion of January 1 to December 31 for domestic use and April 15 to October 15 for lawn and garden irrigation.

CONCLUSIONS OF LAW

13. Pursuant to § 85-2-311(1)(a)(i), MCA, an applicant must prove by a preponderance of the evidence that “there is water physically available at the proposed point of diversion in the amount that the applicant seeks to appropriate.”

14. It is the applicant’s burden to produce the required evidence. *In the Matter of Application for Beneficial Water Use Permit No. 27665-41I by Anson* (DNRC Final Order 1987) (applicant produced no flow measurements or any other information to show the availability of water; permit denied); *In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.*, (DNRC Final Order 2005).

15. An applicant must prove that at least in some years there is water physically available at the point of diversion in the amount the applicant seeks to appropriate. *In the Matter of Application for Beneficial Water Use Permit No. 72662s76G by John Fee and Don Carlson* (DNRC Final Order 1990); *In the Matter of Application for Beneficial Water Use Permit No. 85184s76F by Wills Cattle Co. and Ed McLean* (DNRC Final Order 1994).

16. Applicant has proven that water is physically available at the proposed point of diversion in the amount Applicant seeks to appropriate. § 85-2-311(1)(a)(i), MCA. (Finding of Fact (FOF) Nos. 8-12)

Legal Availability

FINDINGS OF FACT

17. Applicant's proposed diversion from Whitefish Lake will reduce the total volume of water discharging from the Whitefish River system. Thus, the Department finds the area of potential impact for this application to be the Whitefish River system from the Whitefish Lake inlet in Section 5, T31N R22W downstream approximately 27 miles to the confluence with the Stillwater River in the SWSW of Section 4, T28N R21W. Legal availability of Whitefish Lake was quantified monthly.

18. To quantify legally available monthly flows and volumes, the Department first quantified physically available monthly flows (Table 2, column B) and volumes for Whitefish Lake at the POD, then determined monthly flows appropriated by existing users (legal demands) on the source within the area of potential impact (Table 2, columns C-D) by:

- i. Generating a list of existing water rights from above (Table 2, column C) and below (Table 2, column D) USGS Gage #12366000 from the Whitefish Lake Inlet to er with the Stillwater River (list is included in the application file and available upon request);
- ii. Designating irrigation and lawn and garden uses as occurring from April 1 to October 31;
- iii. Designating all other water uses as year-round uses;
- iv. Assigning a single combined flow rate of 0.08 CFS to all livestock direct from source rights without a designated flow rate as per departmental adjudication standard; and,
- v. Assuming that the flow rate of each existing right is continuously diverted throughout each month of the period of diversion. This method of calculation leads to an overestimation of legal demands on the physical volume of available water;

however the Department finds this an appropriate measure of assessing existing rights as it protects existing water users.

19. The Department subtracted the flow rates of the existing legal demands (Table 2, columns C-D) within the area of potential impact from the physically available water (Table 2, column B) to determine legal availability (Table 2, column E). Legally available monthly flows were then converted to monthly volumes (Table 2, column F) using the aforementioned equation (in FOF 11) from DNRC Form 615.

Table 2: Legal Availability in Whitefish Lake					
A	B	C	D	E	F
Month	Physically Available Water at POD (CFS)	Existing Legal Demands from Whitefish Lake Inlet to Gage 12366000 (CFS)	Existing Legal Demands from Gage 12366000 to Whitefish River Mouth (CFS)	Physically Available Water Minus Existing Legal Demands (CFS)	Physically Available Water Minus Existing Legal Demands (AF)
January	93.67	33.17	4.06	56.44	3,464.29
February	90.72	33.17	4.06	53.49	2,965.49
March	119.47	33.17	4.06	82.24	5,047.89
April	294.77	84.57	54.52	155.68	9,247.39
May	580.57	84.57	54.52	441.48	27,098.04
June	667.87	84.57	54.52	528.78	31,409.53
July	349.27	84.57	54.52	210.18	12,900.85
August	188.77	84.57	54.52	49.68	3,049.36
September	165.82	84.57	54.52	26.73	1,587.76
October	151.47	84.57	54.52	12.38	759.88
November	101.67	33.17	4.06	64.44	3,827.74
December	94.37	33.17	4.06	57.14	3,507.25

20. The Department finds that the requested flow rate of 25 GPM (0.06 CFS) up to an annual volume of 1.13 AF is legally available in Whitefish Lake during the proposed period of diversion of January 1 to December 31 for domestic use and April 15 to October 15 for lawn and garden irrigation.

CONCLUSIONS OF LAW

21. Pursuant to § 85-2-311(1)(a), MCA, an applicant must prove by a preponderance of the evidence that:

(ii) water can reasonably be considered legally available during the period in which the applicant seeks to appropriate, in the amount requested, based on the records of the department and other evidence provided to the department. Legal availability is determined using an analysis involving the following factors:

- (A) identification of physical water availability;
- (B) identification of existing legal demands on the source of supply throughout the area of potential impact by the proposed use; and
- (C) analysis of the evidence on physical water availability and the existing legal demands, including but not limited to a comparison of the physical water supply at the proposed point of diversion with the existing legal demands on the supply of water.

E.g., ARM 36.12.101 and 36.12.120; Montana Power Co., 211 Mont. 91, 685 P.2d 336 (Permit granted to include only early irrigation season because no water legally available in late irrigation season); *In the Matter of Application for Beneficial Water Use Permit No. 81705-g76F by Hanson* (DNRC Final Order 1992).

22. It is the applicant's burden to present evidence to prove water can be reasonably considered legally available. Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 7 (the legislature set out the criteria (§ 85-2-311, MCA) and placed the burden of proof squarely on the applicant. The Supreme Court has instructed that those burdens are exacting.); see also Matter of Application for Change of Appropriation Water Rights Nos. 101960-41S and 101967-41S by Royston (1991), 249 Mont. 425, 816 P.2d 1054 (burden of proof on applicant in a change proceeding to prove required criteria); *In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.*, (DNRC Final Order 2005) (it is the applicant's burden to produce the required evidence.); *In the Matter of Application for Beneficial Water Use Permit No. 41H 30023457 by Utility Solutions, LLC* (DNRC Final Order 2007) (permit denied for failure to prove legal availability); see also ARM 36.12.1705.

23. Applicant has proven by a preponderance of the evidence that water can reasonably be considered legally available during the period in which the Applicant seeks to appropriate, in the amount requested, based on the records of the Department and other evidence provided to the Department. § 85-2-311(1)(a)(ii), MCA. (FOF 17-20)

Adverse Effect

FINDINGS OF FACT

24. Applicant provided a plan showing they can regulate their water use during water shortages. To satisfy the water rights of senior appropriators during periods of water shortages, the Applicant will:

- i. Initially reduce irrigation application by 50 percent;
- ii. Irrigate only flowers, shrubs, and trees to ensure survival through drought;
- iii. Turn off the pump when a senior appropriator makes a valid call for water; and
- iv. The Appropriator will haul in potable water for domestic use.

25. Applicant has proven both physical and legal availability of Whitefish Lake water at the proposed point of diversion. The Department finds that enough water remains in Whitefish Lake to meet existing legal demands and the requested 25 GPM up to 1.13 AF. The Applicant has shown that they can regulate their water use, and that they have an implementation plan to protect senior water users. The Department finds that the proposed use of water will not adversely affect senior water users.

CONCLUSIONS OF LAW

26. In regard to senior hydropower water rights, the facts in this application are distinguishable from those in the Matter of Application for Beneficial Water Use Permit No. 76N30010429 by Thompson River Lumber Co (2006) (TRLC) concerning the Avista Company's water rights for Noxon Reservoir. Thompson River Company's proposed diversion on the Clark Fork was surface water immediately upstream of Avista's Noxon Reservoir that had an immediate calculable adverse impact on Avista's water rights and power production.

27. Section §85-2-401, MCA, makes clear that an appropriator is not entitled under the prior appropriation doctrine to protect itself from all changes in condition of water occurrence. In this basin which is not closed to surface or ground water appropriations, priority of appropriation for a large hydropower right that may otherwise prohibit future upstream development in the basin, does not, pursuant to §85-2-401, MCA, include the right to prevent the decrease of streamflow or the lowering of a water table or water level if the prior appropriator can reasonably exercise their water right under the new conditions. Here, the Department finds that Avista and Confederated

Salish and Kootenai Tribes' prior appropriations in this basin, which has not been closed to appropriation by the Legislature, does not include the right to prevent this appropriation where Avista and Confederated Salish and Kootenai Tribes can reasonably exercise their hydropower water rights.

28. Pursuant to § 85-2-311(1)(b), MCA, the Applicant bears the affirmative burden of proving by a preponderance of the evidence that the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected. Analysis of adverse effect must be determined based on a consideration of an applicant's plan for the exercise of the permit that demonstrates that the applicant's use of the water will be controlled so the water right of a prior appropriator will be satisfied. See Montana Power Co. (1984), 211 Mont. 91, 685 P.2d 336 (purpose of the Water Use Act is to protect senior appropriators from encroachment by junior users); Bostwick Properties, Inc. ¶ 21.

29. An applicant must analyze the full area of potential impact under the § 85-2-311, MCA criteria. *In the Matter of Beneficial Water Use Permit No. 76N-30010429 by Thompson River Lumber Company* (DNRC Final Order 2006). While § 85-2-361, MCA, limits the boundaries expressly required for compliance with the hydrogeologic assessment requirement, an applicant is required to analyze the full area of potential impact for adverse effect in addition to the requirement of a hydrogeologic assessment. Id. ARM 36.12.120(5).

30. Applicant must prove that no prior appropriator will be adversely affected, not just the objectors. Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 4.

31. In analyzing adverse effect to other appropriators, an applicant may use the water rights claims of potentially affected appropriators as evidence of their "historic beneficial use." See Matter of Application for Change of Appropriation Water Rights Nos. 101960-41S and 101967-41S by Royston (1991), 249 Mont. 425, 816 P.2d 1054.

32. It is the applicant's burden to produce the required evidence. E.g., Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 7 (legislature has placed the burden of proof squarely on the applicant); *In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.*, (DNRC Final Order 2005). (DNRC Final Order 2005). The Department is required to grant a permit only if the § 85-2-311, MCA, criteria are proven by the applicant by a preponderance of the evidence. Bostwick Properties, Inc. ¶ 21.

33. Section 85-2-311 (1)(b) of the Water Use Act does not contemplate a de minimis level of adverse effect on prior appropriators. Wesmont Developers v. DNRC, CDV-2009-823, First Judicial District Court, *Memorandum and Order*, (2011) Pg. 8.

34. Applicant has proven by a preponderance of the evidence that the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected. § 85-2-311(1)(b), MCA. (FOF 24-25)

Adequate Diversion

FINDINGS OF FACT

35. Applicant will divert water year-round from Whitefish Lake at a maximum rate of 25 GPM using a 4-inch Goulds model 25GS15 1.5-HP submersible pump controlled by a Franklin Electric QD control box equipped with a variable frequency drive (VFD). The VFD will be set to ensure a constant system operating pressure of 60-70 pounds per square inch (psi) in order to meet variable demands. The pump will include a check-valve and will be located 45-feet offshore approximately 15-feet below the low-water elevation. A 1.25-inch high density polyethylene (HDPE) supply line will convey water approximately 100 feet from the pump to a Well-X-Trol WX-250 hydropneumatic pressure tank within the residence basement. After the pressure tank, water flows through two sediment filters and an ultraviolet light disinfection system before distribution to household fixtures.

36. From April 15 - October 15, the tank will also supply the lawn and garden irrigation system via an irrigation controller. From the irrigation controller, a pressure-compensating Hunter Drip Line will distribute water to the drip irrigation zone. The irrigation system is comprised of approximately 315 feet of drip irrigation Hunter Drip Line sized to deliver 0.9 gallons per hour per orifice and orifice spacing of 12 inches, resulting in a cumulative delivery rate of 4.7 GPM, with a maximum volume of 0.13 AF over 0.05 acres.

37. The total dynamic head (TDH) of the system during peak demand is 177 feet, based on:

- i. The minimum system operating pressure of 60 psi (equivalent to 138.6 feet of head);
- ii. A 26-foot elevation gain from Whitefish Lake's surface to the pressure tank; and,

- iii. The friction losses in the 1.25-inch HDPE supply line at 24 GPM (equivalent to 12.04 feet of head).

38. The pump can produce 25 GPM at 177 feet of TDH based on the Applicant-provided system specifications, though the maximum diverted flow rate will be limited/controlled by the VFD. This flow rate will allow the Applicant to supply their water system at peak demand at an adequate operating pressure. The Department finds the system capable of producing and distributing the requested flow rate of 25 GPM and annual volume of 1.13 AF.

CONCLUSIONS OF LAW

39. Pursuant to § 85-2-311(1)(c), MCA, an Applicant must demonstrate that the proposed means of diversion, construction, and operation of the appropriation works are adequate.

40. The adequate means of diversion statutory test merely codifies and encapsulates the case law notion of appropriation to the effect that the means of diversion must be reasonably effective, i.e., must not result in a waste of the resource. *In the Matter of Application for Beneficial Water Use Permit No. 33983s41Q by Hoyt* (DNRC Final Order 1981); § 85-2-312(1)(a), MCA.

41. Applicant has proven by a preponderance of the evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate for the proposed beneficial use. § 85-2-311(1)(c), MCA (FOF 35-38)

Beneficial Use

FINDINGS OF FACT

42. The Applicant requests 1.0 AF for a single domestic household (per ARM 36.12.115(2)(a)) with a requested period of diversion and use from January 1 – December 31 (per ARM 36.12.112(1)(a)). This plat was created in May 1950 prior to sanitary review, and thus the property does not have restrictions against using surface water from Whitefish Lake for domestic use.

43. The Applicant requests 0.13 AF annually to irrigate 0.05 acres of lawn and garden per ARM 36.12.115(b) lawn and garden standard of 2.5 acre-feet per acre ($2.5 \text{ AF/acre} \times 0.05 \text{ acres} = 0.13 \text{ AF}$). The requested period of use for the lawn and garden irrigation use is from April 15 – October 15 (USDA-NRCS climatic area III) per ARM 36.12.112(1)(c)(iii).

44. The water flow demand of 25 GPM was confirmed through an applicant-provided fixture value analysis based on the American Water Works Association M22 Manual. Irrigation of the lawn and garden areas will occur as needed during the irrigation season. At an operating pressure of 60-psi, the sprinkler zone equipped with 315 feet of Hunter Drip Line will produce up to 4.7 GPM. Irrigation operation may overlap with domestic water use; therefore, the total requested flow rate of 25 GPM is equal to domestic use demand plus irrigation use demand.

45. The Department finds that the proposed uses are beneficial, that the requested flow rate is adequate to provide the volume for both purposes throughout their requested periods of use, and that the requested flow rate of 25 GPM and annual volume of 1.13 AF are reasonably justified.

CONCLUSIONS OF LAW

46. Under § 85-2-311(1)(d), MCA, an Applicant must prove by a preponderance of the evidence the proposed use is a beneficial use.

47. An appropriator may appropriate water only for a beneficial use. See also, § 85-2-301 MCA. It is a fundamental premise of Montana water law that beneficial use is the basis, measure, and limit of the use. E.g., McDonald, supra; Toohey v. Campbell (1900), 24 Mont. 13, 60 P. 396. The amount of water under a water right is limited to the amount of water necessary to sustain the beneficial use. E.g., Bitterroot River Protective Association v. Siebel, Order on Petition for Judicial Review, Cause No. BDV-2002-519, Montana First Judicial District Court, Lewis and Clark County (2003), *affirmed on other grounds*, 2005 MT 60, 326 Mont. 241, 108 P.3d 518; *In The Matter Of Application For Beneficial Water Use Permit No. 43C 30007297 by Dee Deaterly* (DNRC Final Order), *affirmed other grounds, Dee Deaterly v. DNRC et al*, Cause No. 2007-186, Montana First Judicial District, *Order Nunc Pro Tunc on Petition for Judicial Review* (2009); Worden v. Alexander (1939), 108 Mont. 208, 90 P.2d 160; Allen v. Petrick (1924), 69 Mont. 373, 222 P. 451; *In the Matter of Application for Beneficial Water Use Permit No. 41S-105823 by French* (DNRC Final Order 2000).

48. Amount of water to be diverted must be shown precisely. Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 3 (citing BRPA v. Siebel, 2005 MT 60, and rejecting applicant's argument that it be allowed to appropriate 800 acre-feet when a typical year would require 200-300 acre-feet).

49. It is the applicant's burden to produce the required evidence. Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 7; *In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.*, (DNRC Final Order 2005); see also Royston; Ciotti.

50. Applicant proposes to use water for domestic use and lawn and garden irrigation, which are recognized as beneficial uses. § 85-2-102(5), MCA. ARM 36.12.101(22). Applicant has proven by a preponderance of the evidence that domestic use and lawn and garden irrigation are beneficial uses and that the 1.13 AF of diverted volume and 25 GPM of water requested is the amount needed to sustain the beneficial use. § 85-2-311(1)(d), MCA. (FOF 42-45)

Possessory Interest

FINDINGS OF FACT

51. The Applicant signed the affidavit on the application form affirming the Applicant has possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use.

CONCLUSIONS OF LAW

52. Pursuant to § 85-2-311(1)(e), MCA, an Applicant must prove by a preponderance of the evidence that it has a possessory interest or the written consent of the person with the possessory interest in the property where the water is to be put to beneficial use, or if the proposed use has a point of diversion, conveyance, or place of use on national forest system lands, the applicant has any written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water under the permit.

53. Pursuant to ARM 36.12.1802:

- (1) An applicant or a representative shall sign the application affidavit to affirm the following:
 - (a) the statements on the application and all information submitted with the application are true and correct and
 - (b) except in cases of an instream flow application, or where the application is for sale, rental, distribution, or is a municipal use, or in any other context in which water is being supplied to another and it is clear that the ultimate user will not accept the supply without consenting to the use of water on the user's place of use, the applicant has possessory

interest in the property where the water is to be put to beneficial use or has the written consent of the person having the possessory interest.

(2) If a representative of the applicant signs the application form affidavit, the representative shall state the relationship of the representative to the applicant on the form, such as president of the corporation, and provide documentation that establishes the authority of the representative to sign the application, such as a copy of a power of attorney.

(3) The department may require a copy of the written consent of the person having the possessory interest.

54. Applicant has proven by a preponderance of the evidence that it has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. § 85-2-311(1)(e), MCA. (FOF 51)

PRELIMINARY DETERMINATION

Subject to the terms, analysis, and conditions in this Order, the Department preliminarily determines that this Application for Beneficial Water Use Permit No. 76LJ 30159396 should be GRANTED.

The Department determines the Applicant may divert water from the Whitefish River (Whitefish Lake) using a pump at 25 GPM up to an annual volume of 1.13 AF for domestic use (1.0 AF) and for irrigation of 0.05 acres of lawn and garden (0.13 AF). Domestic use may occur from January 1 – December 31 and lawn and garden irrigation may occur from April 15 – October 15 annually. The point of diversion (POD) and place of use (for both purposes) are located in the NENENW of Section 10, Township 31N, Range 22W, Flathead County, Montana (Figure 1). The place of use can be further described as Lot 50 of the Rest Haven Subdivision.

NOTICE

This Department will provide public notice of this Application and the Department's Preliminary Determination to Grant pursuant to §§ 85-2-307, MCA. The Department will set a deadline for objections to this Application pursuant to §§ 85-2-307, and -308, MCA. If this Application receives no valid objection or all valid objections are unconditionally withdrawn, the Department will grant this Application as herein approved. If this Application receives a valid objection, the application and objection will proceed to a contested case proceeding pursuant to Title 2 Chapter 4 Part 6, MCA, and § 85-2-309, MCA. If valid objections to an application are received and withdrawn with stipulated conditions and the department preliminarily determined to grant the permit or change in appropriation right, the department will grant the permit or change subject to conditions necessary to satisfy applicable criteria. DATED this 22nd day of June, 2023.

/Original signed by Jim Ferch/
Jim Ferch, Regional Manager
Kalispell Regional Office
Department of Natural Resources and Conservation

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the PRELIMINARY DETERMINATION TO GRANT was served upon all parties listed below on this 22nd day of June, 2023, by first class United States mail.

2886 REST HAVEN DRIVE LLC
C/O ROBERT A. WALLER JR.
1416 PINE AVE
MANHATTAN BEACH, CA 90266-5042

WATER & ENVIRONMENTAL TECHNOLOGIES
ATTN: NATHAN SMALL
102 COOPERATIVE WAY, STE 100
KALISPELL, MT 59901

Jim Ferch
Kalispell Regional Office
(406) 752-2706

DATE